IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE: KANDACE ZUMBRO, Debtor	Chapter 13 Case Number 09-11145
KANDACE ZUMBRO, Plaintiff vs. THE EDUCATION RESOURCES INSTITUTE, INC. Defendant	Adversary Proceeding Number 09-01046

ORDER

Before the Court is Kandace Zumbro's ("Plaintiff['s]") Motion to Reconsider Judgment and for a New Trial. The Court has jurisdiction pursuant to 28 U.S.C. §1334 and this is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I). For the reasons set forth below, Plaintiff's motion is granted and the debt is dischargeable.

FINDINGS OF FACT

On June 3, 2011, the Court entered an order excepting from discharge the debt owed to The Education Resources Institute, Inc.

("Defendant"). Order, Dckt. No. 60. In the prior order, the Court made extensive findings of facts which are incorporated into this order by reference. In her motion, Plaintiff's grounds for reconsideration are that she "has additional testimony that if taken by the Court will show that Plaintiff's debt to Defendant should be discharged. Thus, Plaintiff asks the Court for a new trial on this contested matter or at the very least that the Court reopen the case to take additional testimony." Motion, Dckt. No. 62 at 2. At the hearing on the motion for reconsideration, Plaintiff asserted that the Court misapplied 34 C.F.R. §685.208 in its prior order because the student loans at issue are privately subsidized as opposed to government subsidized, and thus these student loans are not eligible for the government deferment, extension or reworking programs as this Court originally thought. Plaintiff further states the government programs would not be applicable to Plaintiff because she is a cosignor, not the borrower. Defendant contends the error is harmless and the Court's holding should stand as there is ample support to conclude Plaintiff failed to carry her burden of proof on the second prong of the Brunner test to establish the current state of affairs is likely to persist for a significant portion of the repayment period of the student loans. Defendant further argues Plaintiff should have brought the evidence at the trial and she should not get "a second bite at the apple."

CONCLUSIONS OF LAW

Bankruptcy Rule 9023 adopts Rule 59 of the Federal Rules of Civil Procedure and provides in pertinent part:

> (a) In General.
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> (1) Grounds for New Trial. The court may, on motion, grant a new trial on all or some of the issues--and to any party--as follows:
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> (A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or
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> (B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.
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> (2) Further Action After a Nonjury Trial. After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.
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> (e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

Fed. R. Civ. P. 59.

"The only grounds for granting [a Rule 59(e)] motion are newly-discovered [previously unavailable] evidence or manifest errors of law or fact." Mincey v. Head, 206 F.3d 1106, 1137, n. 69

(11th Cir. 2000); In re Dixon, 2007 WL 4707166 *2 (Bankr. M.D. Fla. August 29, 2007) citing Ball v. Interoceanica Corp., 71 F.3d 73, 76 (N.Y.S.2d 1995). After considering the matter, I find that I made a manifest error of fact and law in applying the federal regulation providing a 30-year repayment time frame to erroneously conclude that Plaintiff's loans could be deferred or extended.

At the trial, Plaintiff failed to put forth any evidence of the repayment period, but stated the Court could take judicial notice of the filed proof of claim and schedules in the underlying case as proof of the amount of the debt and the repayment terms as well as Plaintiff's testimony that the payment amount is $953/month. Upon re-examination, the proof of claim does not indicate that the loans are government-subsidized loans and I incorrectly assumed they were government-subsidized loans. As a result of this manifest error, I incorrectly concluded that Plaintiff had failed to establish that the current state of affairs is likely to persist for a significant portion of the *repayment period* of the student loans which I extended out for thirty years. Brunner v. New York Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d. Cir. 1987)(emphasis added). As discussed below, this manifest error is not a harmless one. Also, contrary to Defendant's assertions this is not a "second bite at the apple." As a result of this error of law and fact, Plaintiff was not given an opportunity to address the applicability

of 34 C.F.R. §685.208. As discussed hereafter, the repayment period in the proof of claim is much shorter. Therefore, Plaintiff's motion for reconsideration should be granted and the focus turns to reconsidering the second prong of the Brunner test.

Reconsidering the second prong in light of this information, I note two of the three notes matured in 2006 and are past due and the remaining note matures in 2016. Given the repayment period of the loans, I find Debtor meets the second prong of the Brunner test. As the Eleventh Circuit noted in Mosley, the mere fact that Debtor has not attempted to negotiate a lower monthly plan or enroll in an Income Contingent Repayment Program, or similar program, is not a bar to a finding of undue hardship. Educ. Credit Mgmt. Corp. v. Mosley (In re Mosley), 494 F.3d 1320, 1327 (11th Cir. 2007).

Factors relevant to this prong include, without limitation, Debtor's age and education, the age of Debtor's dependants, her work and income history, her physical and mental health, and other relevant circumstances. Douglas v. Educ. Credit Mgmt. Corp. (In re Douglas), 366 B.R. 241, 256 (Bankr. M.D. Ga. 2007). Part of the calculation in the prior order was that over a significant portion of the incorrectly presumed 30 year repayment period, Debtor would no longer have minor children residing in her home. However applying the correct repayment period, at the time of

trial, Plaintiff had minor children living with her and she will continue to have at least three minor children during a significant portion of the repayment period. Additionally, as stated in the previous order there are some additional "minimal standard of living" expenses Debtor's family should be able to incur, such as attempting to reinstate her husband's health insurance,[1] food, and clothing expenses. See In re Douglas, 366 B.R. at 253-54. As previously stated in the prior order, while Debtor works in real estate and her husband is in the construction business, neither Debtor nor her non-debtor spouse are earning enough to maintain a minimum standard of living. Neither of these industries show signs of sufficient recovery to be able to address these loans while maintaining a minimal standard of living.

For these reasons, I find I incorrectly concluded that Debtor failed to establish by a preponderance of the evidence a certainty of hopelessness for a significant portion of the repayment period. See In re Mosley, 494 F.3d at 1326. Therefore,

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[1] Debtor's non-debtor spouse allowed his health insurance to be cancelled to fund Debtor's chapter 13 plan.

and it is hereby ORDERED that Plaintiff's motion to reconsider judgment is GRANTED. Furthermore, Plaintiff's debt to the Institute is ORDERED dischargeable.

Susan D. Barrett

SUSAN D. BARRETT
CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 29th Day of March, 2012.